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EXAMINER

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3714

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/821,195
Filing Date: March 29, 2001
Appellant(s): LOOSE ET AL.

MAILED
FEB 01 2007
Group 3700

William D. Pegg
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed July 20th, 2006 appealing from the Office action mailed January 10th, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The Examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,769,716	Saffari et al	6-1998
5,033,744	Bridgeman et al	7-1991
6,089,976	Schneider et al	7-2000

European Patent Application number EP 0 789 338 A1 (Published August 13th 1997),
Bruzzese, Vincent Carmelo

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

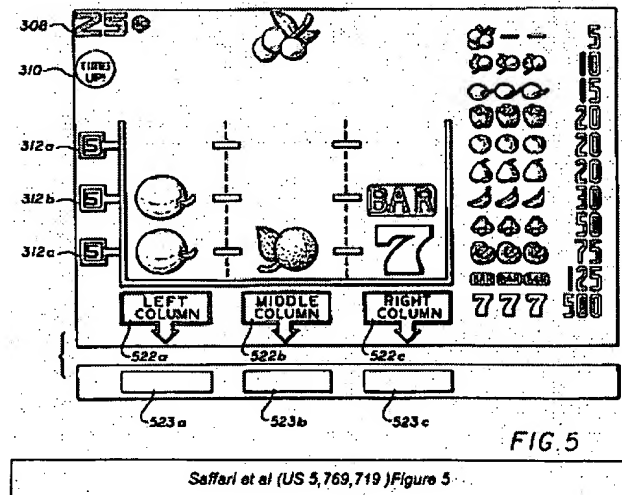
Claim Rejections - 35 USC § 103

Claims 1-3, and 5-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Saffari et al (US 5,769,716) in view of Bruzzese (EP 0789338).

Regarding claims 1, 2, 7, and 9, Saffari teaches an electronic video wager system incorporating a video portion with reel game (Saffari Figure 3 & Col 1:33-55) that displays a plurality of symbols indicating a randomly selected outcome of a wagering game and a separate non-video-portion further

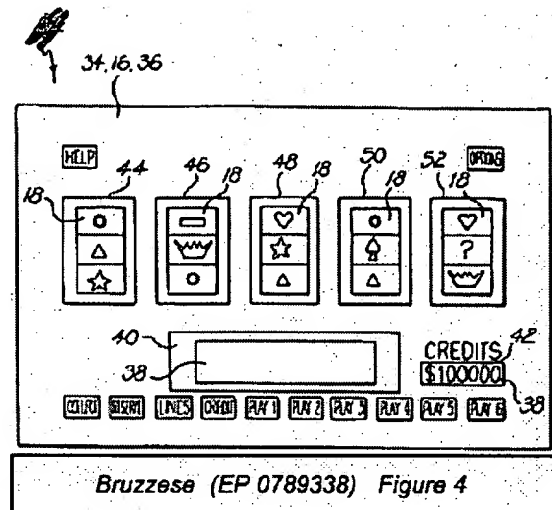
including permanent second indicia (Saffari Elm 522, 523, Figure 5, & Col 3:2-5). The video portion further contains an integrated touch screen display and player selectable indicia (Saffari Col 3:24-34; Col 4:21-27; Col 2:64-3:2, Elm 312). Saffari however is silent regarding the implementation of the permanent indicia as

player selectable indicia and the incorporation of a unitary touch screen across both the video and non-video portions of the display.



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In a related gaming invention Bruzzese teaches a gaming machine including a unitary touch screen (34) incorporating permanent player selectable indicia (Figures 3-4 & Col 3:9-39) and wherein the unitary touch screen spans across both the immediately adjacent game outcome display (44) and non-game outcome portions of the display ("PLAY 1"). It would have been obvious to one of ordinary skill in the art at the time of invention to



have incorporated the touch screen configuration of Bruzzese as taught above into the video game machine with touch screen of Saffari in order to reduce the device manufacture cost as taught by Bruzzese (Col 2:18-24).

Regarding claims 3, 5 and 6, the elements (522) of Saffari may be considered to show the claimed permanent indicia. Alternatively however, Bruzzese teaches the use of an adhesive graphic transfer to create a graphic display or artwork panel as so claimed. Bruzzese further teaches the use of indicia including a "collect" indicia, to indication to the player touch points and their respective function of the artwork panel (Col 3:18-33 & Fig 3).

Regarding claim 8, Saffari teaches the alteration of the video based indicia based on the progress or state of the game as so claimed (Figure 3).

Claims 4 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Saffari et al (US 5,769,716) in view of Bruzzese (EP 0789338) as applied to claims 1 and 3 above in further view of Bridgeman et al (US 5,033,744).

The invention of Saffari/Bruzzese is silent regarding the selective illumination of indicia through lights located behind the artwork panel in order to indicate which indicia are active and may be selected by the player. However in a related gaming device Bridgeman teaches the use of illuminated mechanical switches in order to indicate to a player that a video gaming machine is ready to accept user input (Figure 2 & Col 5:68-6:2). It would have been obvious to one of ordinary skill in the art at the time of invention to have incorporated the use of illumination to indicate the availability of a switch to accept inputs as taught by Bridgeman into the portion of a touch screen located over artwork as taught by Saffari/Bruzzese in order to direct the user to game inputs only when said inputs are available.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Saffari et al (US 5,769,716) in view of Bruzzese (EP 0789338) as applied to claims 1 and 3 above in further view of Schneider et al (US 6,089,976).

The invention of Saffari/Bruzzese is silent regarding the displaying of a bonus game in response to a bonus outcome being achieved however Schneider teaches the displaying of a bonus game on a bonus outcome (Figures 1-2). It would have been obvious to one of ordinary skill in the art at the time of invention to incorporate this

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feature of Schneider into the invention of Saffari/Bruzzese to provide greater interaction between the player and game as well as provide a player with anticipation of the second game during the operation of the first game as taught by Schneider (Col 2:24-33).

(10) Response to Argument

Appellant presents 14 pages of arguments in their brief alleging that the Examiner's rejection is in some manner deficient, for the purposes of this response these argument are rebutted with perseverance given to the order and headings as originally presented by the Appellant in their brief. It will be shown that the Appellant's allegations are deficient for not addressing the rejections of record as presented by the Examiner, relying upon Appellant's own testimony in absence of proper correlation to the evidence of record in the Appellant's brief and further that said testimony will be shown on multiple occasions to not only be unsupported by the evidence of record but in many instances in direct contradiction thereto.

I. Claims 1-3 and 5-9 are **not** patentable under 35 USC 103(a) in view of the combination of Saffari and Bruzzese.

A. The Combination of Saffari and Bruzzese Teaches or Suggests Each and Every Element of the Pending Claims.

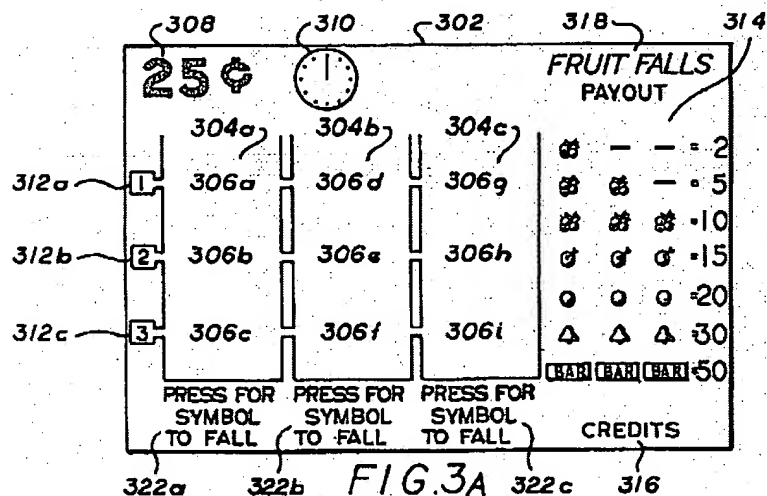
The Appellant states,

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"Saffari fails to disclose or suggest, however, a video portion configured to display (-1-) a plurality of symbols indicating a randomly selected outcome of a wagering game, the (-2-) video portion including player-selectable first indicia selectable via a unitary touch screen (emphasis added)" (Page 6 of the Appellant's brief.)

The Appellant reiterates Element (-2-) further including "To the contrary, Saffari does not disclose or suggest, for example the video portion including player-selectable first indicia selectable via the unitary touch screen. The touch sensitive portion 322a, 322b, 322c, disclosed by Saffari and noted by the Examiner are not in a video portion of a display 302." (Page 6 of the Appellant's brief.)

-1- In the Abstract of Saffari, Saffari describes a plurality of symbols randomly presented to the player responsive to a wager, the symbols may be either placed responsive to a selection by the player or randomly placed by the gaming device to form lines which in turn are inspected for the presence of a predefined



winning combination (Saffari Abstract, Figure 2) and the use of a computer controlled display capable of simulating a three-dimensional display (Col 2:8-19). Accordingly this

feature is maintained by the Examiner as taught by Saffari.

-2- Appellant provides no support within the reference of Saffari to substantiate their interpretation of the prior art of Saffari with their statement "*The touch sensitive portion 322a, 322b, 322c, disclosed by Saffari and noted by the Examiner are not in a video portion of a display 302.*" Further Appellant's interpretation is direct contradiction to the teachings of Saffari including figure 3A of *Saffari*, demonstrating a singular video display screen 302 with elements 322a through 322c shown directly thereon. The Examiner has found no citation or teaching within the reference of Saffari to support this allegation that this element demonstrated by figure 3 as being located on a video display are somehow shown on a "non-video" portion of the same video display or that even such a portion exists in the video display of Saffari and while Saffari does teach specific elements as being displayed on the display screen within the context of the remainder of the specification Saffari states nothing to contradict the teaches contained within the figures with regard to the arrangement shown therein. In yet further additions to the above Saffari teaches modifying the buttons (*Saffari* Elm 224 & Figure 2) through "blanking out" or "deintensifying" the respective location (*Saffari* Col 4:39-44) when a column is full to indicate that a selection is no longer available for selection. This further supports the Examiner's position through teaching that the player selectable indicia are not static but instead dynamically changed based on the operation of the game. Hence Saffari teaches the inclusion of a video display with no mention of non-video portions of a video display and the inclusion of further modifying the indicia contained on the same video

portion according to game conditions. These teaches as demonstrated above are in stark opposition to Appellant's allegations. As the Appellant's arguments are in contradiction to the teachings of the reference as shown by the Examiner the rejection as presented should be maintained.

Appellant proceeds on pages 6 through 7 of the brief to argue that Bruzzese does not teach the features for which Saffari has been relied for by the Examiner, "*Bruzzese does not therefore disclose or suggest a video portion including player selectable first indicia selectable via the unitary touch screen (-3-), as recited in claims 1-3 and 5-9 as noted above... Appellant respectfully submits that Bruzzese cannot be reasonably said by the Examiner to disclose or suggest, for example, a video portion including player-selectable first indicia selectable via said unitary touch screen, as claimed (emphasis added)*" (Page 7 of the Appellant's brief.)

-3- In the interest of clarity the Examiner has relied upon the teachings of Bruzzese to provide a teaching to modify the touch screen component of Saffari and not for the teaching of a video display or player selectable elements. This modification of Saffari extends the already present touch screen component of Saffari beyond it's original positioning over a gaming display to additional player selectable elements separate from the game display forming the claimed unitary touch screen claimed by the Appellant. Argument elements directed towards the secondary reference of Bruzzese for not showing features relied upon and correlated by the Examiner to the primary reference of Saffari error in considering the reference of Bruzzese in isolation and not for what the references of Bruzzese and Saffari would have suggested in

combination to one of ordinary skill in the art at the time of claimed invention.

In the final paragraph, page 7 of the Appellant's brief, the Appellant proceeds to challenge the basis of the Examiner's rejection for a perceived failure to demonstrate a prima facie obviousness, however as demonstrated herein the Appellant's standards for establishing this position are based allegations in direct contradiction to the evidence of record. Specifically the Appellant has alleged that dynamic elements displayed on a video display are in some manner not shown on a video display, which as shown above is in contradiction to the teachings of the Saffari reference. The Appellant has demonstrated through repeated assertions that the standard of obviousness is whether or not each reference relied upon in a combination teaches the claimed invention as a whole in isolation, this interpretation is not commensurate with the rejections as presented or in keeping with the standards established by *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981) or *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

B. The Appellant applies an erroneous standard in determining that Bruzzese teaches away from the combination of Saffari and Bruzzese.

On page 8 of the Appellant's brief the Appellant proceeds to argue that mechanical reels of Bruzzese are an "intrinsic feature of Bruzzese" and provides the following quotes as

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support "significant demand amongst players of gaming machines for the older-style spinning reel machine" and "provides a mechanical reel gaming machine that incorporates touch screen controls."

(See id. At lines 41-43)

It should first be noted that the Appellant raises the issue of bodily incorporation with these arguments that have been deemed to be an improper standard for the determination of non-obviousness.

"The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference.... Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art." In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). See also In re Sneed, 710 F.2d 1544, 1550, 218 USPQ 385, 389 (Fed. Cir. 1983) ("[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review."); and In re Nievelt, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973) ("Combining the teachings of references does not involve an ability to combine their specific structures.").

On a second point the quotations presented by the Appellant are incomplete, the relevant portion of Bruzzese reads,

"Gaming machines that utilise a video monitor to graphically represent the spinning reels also are well known. Such gaming machines similarly incorporate pushbutton controls, although more recently provide for touch screen control by means of controls bonded to the outer surface of the video monitor. There are difficult technical problems associated with bonding touch screen controllers to curved video monitor screens, requiring the use of packing materials at the edge margins and sophisticated data processing techniques to ensure a regular array of touchable screen 'points' and linearity between such points.

Even though video gaming machines utilize more technologically advanced component parts, there still is a significant demand amongst players of gaming machines for the older-style spinning reel machine.

The present invention broadly provides a mechanical spinning reel gaming machine that incorporate touch screen controls (emphasis Added)" (Bruzzese Col 1:25-43).

In relation to this quotation the Appellant argues point,

"Bruzzese expressly prohibits, through it use of mechanical reels 18 and disavowel of video monitors to graphically represent spinning reels (see i.e. Col 1, lines 25-42) the use of a "video portion" for displaying of random outcomes (i.e., the outcomes of the spinning reels)." (Page 8 of the Appellant's brief.),

"...the Examiner has failed to consider evidence of teaching away of such combination and modification" (Page 8 of the Appellant's brief.), and

"A person of ordinary skill in the art would not have looked, in isolation (i.e. without the benefit of the Appellant's disclosure) to combine the features of Saffari and Bruzzese in the manner alleged by the Examiner, since they conflict with one another on this point." (Page 8 of the Appellant's brief.)

In response the Examiner first notes that disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. In re Susi, 440 F.2d 442, 169 USPQ 423 (CCPA 1971). "A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994). In relation to this, the prior

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art of Bruzzese never prohibits the use of a unitary touch screen with a video display and in fact acknowledges that such technology is of common knowledge to those of ordinary skill in the art.

Finally the Appellant makes the argument of hindsight yet any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In view of the preceding the Appellant has failed to demonstrate what portions of the claimed combination must have been gleaned from their disclosure and not provided for through the prior art of record accordingly failed to support their allegations of improper hindsight reasoning.

C. The Appellant requests that the Board consider their "Indicium of Nonobviousness"

Respectfully the Appellant's arguments titled under this section and extending from the first paragraph of page nine through the first paragraph of page ten address "the problem addressed and solved" yet these arguments, contain no evidence supporting the Appellant's allegation nor do they address the merits on Appeal. Moreover this request for consideration as presented by the Appellant is improper for failing to timely and properly submit additional evidence for non-obvious under 37 CFR 1.132 prior to the final office action as set forth by MPEP § 716.

In the first full paragraph of page ten the Appellant applies the same piecemeal analysis to the prior art references as previously presented and refuted above by the Examiner in sections **A** and **B**. Additionally the Appellant alleges, "Instead, the Examiner cites Bruzzese as disclosing a unitary touch screen (34) overlapping a video portion and a non-video portion". This statement is in error because, as stated above the Examiner has not relied upon Bruzzese for teaching the use of a video portion and the combination of elements attributed to a singular prior art reference by the Appellant has been addressed by the combination of the Saffari and Bruzzese references by the Examiner in the presented rejection.

In the paragraph bridging pages ten and eleven the Appellant challenges the teaching of Bruzzese as being limited to solely the mechanical gaming device embodiment taught by Bruzzese and specifically not applicable to the video gaming machine of Saffari because the Appellant's would seem to propose that only the movement of the video buttons of Saffari to a non-video display could result in the claimed combination yet, the teachings of Saffari are not purely limited to the inclusion of video display buttons as suggested by the Appellant. The Appellant's interpretation of Saffari relies on a particular embodiment not relied upon the Examiner in the presented rejection and while Saffari does teach an embodiment wherein the buttons are incorporated into the display as relied upon by the Appellant, Saffari additionally teaches the embodiment relied upon by the Examiner including the use of mechanical buttons (*Saffari* Figure 5 & Col 2:64-3:7). The Appellant has effectively challenged the

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Examiner's rejection through first modifying the rejection through ignoring the correlation of mechanical buttons presented in the final office action (Page 4 Dated January 10th, 2006)and then proceeding to argue the flaws of their modified rejection. The Examiner is unaware of any precedent that would allow for the Appellant to effectively create their own rejection and argue that rejection as a basis for patentability of their claimed invention.

D. The Appellant argues that the Equivalence of Bruzzese graphical element has not been established

Starting with the final paragraph of page eleven and extending through page twelve of the Appellant's brief the Appellant argues the teachings of the Bruzzese reference for not providing the features as taught relied upon by the Examiner as included in the Saffari reference. The Appellant suggests that the Examiner's correlation is reliant on a holding of equivalence to the Bruzzese reference for features relating to a player selectable indicia present on a video portion and a player-selectable second indicia on a second non-video portion however ,even if such an equivalence were relied upon by the Examiner this has been provided for by Bruzzese as cited on pages 10-12 above, the teachings of Bruzzese quoted therein clearly recognize the equivalence between video and non-video displays. The teaching in the Bruzzese reference cited above on pages 10-12 additionally recognize that the touch sensitive element of a display is a separate element to the underlying display itself and accordingly no utilization of equivalence would be required to appreciate the teachings

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of Bruzzese for a separate touch screen overlay extended over a game and player input portion of a gaming device.

2. The Appellant argues that Claims 4 and 11 should be patentable under 35 USC 103(A) in view of the combination of Saffari, Bruzzese, and Bridgeman

Starting with the second full paragraph of page 13 and extending through page 16 of the Appellant's brief the Appellant improperly challenges the rejection of record in piecemeal fashion in the stead, of addressing the teachings of the combination of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

The Appellant's exemplary claim 4 as presented reads,

"4. The game machine of claim 3, wherein said second indicia are selectively illuminated by lights located behind said artwork panel to indicate which of said second indicia are active and can be selected by the player".

Prior art Bridgeman broadly teaches a wagering device including a video display and mechanical buttons including the use of illumination to indicate that the buttons are ready to accept player input. With regards to this feature Bridgeman states,

"A drive circuit 226 controls the light circuits 238 that light up the buttons to indicate the key activators 236 are ready to accept input data." (Bridgeman Col 5:68-6:2)

Bridgeman additionally teaches that the gaming inputs available to the player vary during the play of the game (Bridgeman Figure 4 & Elm 56, 58, 60, 62). From these two teachings it must inherently flow that the light circuits of Bridgeman are

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capable of selectively illuminating the buttons otherwise the illumination of all of the buttons regardless of whether they were active during a given stage of the game would be incapable of performing the stated purpose/function of the illumination "to indicate the key activators 236 are ready to accept input data" as present by Bridgeman.

On the first three lines of page fifteen of the Appellant's brief the Appellant argues that the base reference of Saffari teaches only buttons that are continually available to the player, yet this is in contradiction to the teaching of Saffari. Saffari in fact goes so far as to suggest that corresponding selection areas of his video touch screen embodiment to blank-out or deintensify the touch screen legend for the respective column so that the user is permitted to select only from the active remaining columns depending on the present state of the game.

"If the newly placed symbol results in one of the columns being completely filled, it may be desired to blank-out or deintensify the touch screen legend 332 for that column so that the user is then permitted to select only from the "active" remaining columns 224. (Saffari Col 4:39-43)

Appellant's additional arguments present on page fifteen are directed to the teachings of the Bruzzese reference regarding the illumination of buttons yet, Bruzzese has not been relied upon by the Examiner for teachings directed to the illumination of a button. Hence these arguments fail to address the rejection as presented.

3. The Appellant argues that Claims 10 should be patentable under 35 USC 103(A) in view of the combination of Saffari, Bruzzese, and Schneider

Starting on the middle of page 16 and continuing through page 17 of the Brief the Appellant simply states that the reference of Schneider fails to teach the claimed invention as a whole. There is no rejection of record solely dependent on the teachings Schneider and the respective cited claim was rejected under the combination of Saffari Bruzzese, and Schneider. The Appellant is improperly performing a piecemeal analysis of the respective rejection. It is noted that the Appellant challenges the reference for teaching the entire invention claimed invention yet does not argue that the reference as applied is in any manner improper. Furthermore, even if one were to read their arguments as intending to be cumulative with the Appellant's arguments directed to claim 1 (the parent claim of 10) such arguments such a holding would be instantly redressed in the redress of claim 1.

Conclusion

The Appellant has challenged the grounds of rejection on multiple fronts including:

presenting correlations of embodiments of the prior art not relied upon by the Examiner in the presentation of the rejections and effectively therewith has created and argued their own correlation between the prior art and the instantly claimed invention to provide a basis for patentability of their invention (Appellant's Brief page 5);

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presenting quotations of the prior art out of their original context and with relevant portions omitted resulting in a distortion of the prior art teachings (Appellant's Brief pages 7 & 8); and
mischaracterizations of prior art (Appellant's Brief pages 6, 15).

With regards to the Appellant's alternative correlations, the Appellant's brief (Brief Page 4) cites Element 522 of Saffari in reciting the Examiner's Final rejection of January 10th, 2006 in their brief presumably acknowledging the reliance of that element in the Examiner's rejection yet the remainder of the brief never addresses the respective element. In this instance element 522 of Saffari demonstrate a mechanical input device, the same type of device that the Appellant further argues is not present in the device of Saffari. The remainder of the Appellant's arguments instead address Element 322 of Saffari utilized by Saffari to demonstrate an equivalent touch screen version of the mechanical button 522. The Appellant has acknowledged the Examiner's correlation to the elements of the prior art and then effectively applied and argued a separate correlation accordingly it is respectfully suggested that such correlation is improper for not addressing the rejection of record.

With regards to the Appellant's presentation of quotations of the prior art out of their original context, As presented by the Examiner on pages ten through twelve of this Examiner's Answer, the Appellant's referenced citations are presented out of their original context to create a teaching not commensurate with their original use in the Bruzzese reference. Accordingly these teachings presented by the Appellant are not

supported by the disclosure of Bruzzese and therefore would be an improper basis for determining a destructive combination or teaching away from the combination, as they are not contained in the references in the manner suggested by the Appellant.

And finally with regards to the Appellant's mischaracterizations of prior art, The Appellant would suggest that Saffari teaches a set of buttons that are continuously illuminated (Brief page 15) in direct contradiction to Element 224 of Figure 2 and Column 4 lines 39-43 of Saffari. The Appellant argues that the touch sensitive element 322 are not in a video portion of display 302 (Brief page 6), yet the computer controlled display screen (302, 112) is the only component of display as shown in figure 3A of Bruzzese. With no other explanation or teaching provided for by the Appellant with reference to the disclosure of Saffari regarding the incorporation of this non-video portion of a video display screen the Appellant has created additional components of a display device not taught by the prior art of Saffari (Page 6). And this mischaracterization of the correlation of elements contrary the to Appellant's suggestion was not introduced by the Examiner on the Final Action of January 10th, 2006 but, instead by the Appellant in their alternative correlation addressed in part at the top of page 19 of this Answer.

The rejection as presented by the Examiner has been shown to be based within the teaching of the prior art references, while the Appellant challenges are argued on a selective interpretation of the prior art that is dependant on an alternative correlation between the prior art and the claimed invention, the selective quotation of the prior art teachings, and a mischaracterization of the teachings of the prior art. For these

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reasons and those additional reasons addressed in the Examiner's rejection and response to arguments presented to the honorable board above the rejection as present should be held proper and maintained.

(11) Related Proceeding(s) Appendix

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



Robert Mosser Patent Examiner Technology Center 3700

Conferees:


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